State of California
Regional Water Quality Control Board
San Diego Region

EXECUTIVE OFFICER SUMMARY REPORT
November 13, 2002

ITEM: 17

SUBJECT: Inclusion of the Caldwell Family Trust as a named discharger in Addendum No. 1 to Cleanup and Abatement Order (CAO) 2001-226 issued for the cleanup and abatement of unauthorized discharges of petroleum hydrocarbon wastes from a retail gasoline station located at 28111 Front Street, Temecula. (Jody Ebsen)

PURPOSE: To hold a public hearing on the matter of naming the Caldwell Family Trust as a discharger in Addendum No. 1 to CAO 2001-226.

PUBLIC NOTICE: The public was notified of this hearing in the agenda for the November 13, 2002 meeting of the Regional Board. The agenda was mailed to interested persons on October 25, 2002.

DISCUSSION: The Caldwell Family Trust (Caldwell) requested a hearing (Supporting Document 1) to contest its inclusion in Addendum No. 1 to CAO No. 2001-226 (Supporting Document 2) as a discharger responsible for the cleanup and abatement of petroleum hydrocarbon waste from the underground storage tank (UST) system at 28111 Front Street in Temecula. Caldwell owns the property on which the UST system is located, and was ordered to clean up the site along with current and former UST system owners/operators. The other dischargers named in the order are Mr. and Mrs. Kanwar Narain (Narain), Summit Energy Corporation, and Summit Oil & Gas. The order found that, as landowners, Caldwell caused or permitted the discharges of petroleum wastes to groundwater beneath the property because it owns the contaminated land from which wastes are discharged to groundwater. Further, Caldwell had knowledge of the discharge of waste and had sufficient control of the property to stop the discharge.

The migration of pollutants from contaminated soil into groundwater and the migration of polluted groundwater into unpolluted parts of the aquifer constitute the discharge that Caldwell caused or permitted. Caldwell had knowledge of the discharge because staff kept Caldwell informed of the progress of the cleanup conducted by Narain through correspondence and verbal communication beginning in November 2000. Caldwell's lease with the owners/operators of the gasoline station gave them sufficient control of the property to stop the discharge. The parts of the lease dealing with hazardous materials and cleanups are reproduced in Supporting Document 3. These findings are consistent with the leading orders of the State Water Resources Control Board that address the liability of landowners for discharges they did

not initially cause or permit. These orders are Order No. 86-2 (Zoecon Corporation; Supporting Document 4) and Order No. WQ 89-8 (Spitzer et al; Supporting Document 5).

The condition of pollution at the site combined with it's proximity to an impaired public supply well, make it imperative that cleanup efforts are expeditious and not held up by outside considerations. With the exception of the last year, Narain has a poor record of compliance with regulatory orders. Additionally, Narain is paying for its share of the cleanup without benefit of reimbursement from the State UST Cleanup Fund. To date, Narain has spent approximately $85,000 out of $140,000 that has been incurred on the cleanup (Supporting Document 6). Should the cost of the cleanup drive Narain into bankruptcy, the order ensures that Caldwell will continue the cleanup.

Currently unresolved legal issues and pending lawsuits exists among Caldwell, Summit Energy Corporation and Summit Oil & Gas. Summit Energy Corporation holds the current lease on the property and is the licensed owner of the UST system. Summit Oil & Gas has control of the station and is the current operator of the UST system. Putting Caldwell on the order was necessary because of the confusion over which party was the current owner/operator of the UST system, and because of difficulty establishing communication with Summit Energy Corporation and Summit Oil & Gas between November 2001 and April 2002 when a diesel leak was suspected, and later confirmed at the station. Summit Oil & Gas has been particularly non-responsive to requests for information. Most recently Summit Oil & Gas verbally agreed in a meeting to provide information to the group but failed to follow through. Investigative Order R9-2002-0329 had to be issued to have them provide the necessary information that was not volunteered to the group. Naming Caldwell along with the lessees as dischargers on the order has proven to be an effective tool in getting all the dischargers to work together, and in achieving compliance with the order's directives. Narain and Summit Energy Corporation are entering into a cost sharing agreement and have jointly hired a consultant to ensure compliance with the directives.

LEGAL CONCERNS: None

SUPPORTING DOCUMENTS

1. Letter dated October 21, 2002, from John H. Reaves, requesting a hearing on behalf of Caldwell.
2. Cleanup and Abatement Order 2001-226, including Addendum No. 1.
3. Portions of Ground Lease for 28111 Front Street.
4. SWRCB Order No. 86-2 (Zoecon).
5. SWRCB Order No. WQ 89-8 (Spitzer et al).
6. Summary of Expenditures incurred by Narain.
7. Location Map.

RECOMMENDATION: Affirm CAO No. 2001-226 and Addendum No. 1 as written.

ITEM 17
Sup. Doc 1

LAW OFFICES
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A PROFESSIONAL CORPORATION
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SAN DIEGO, CALIFORNIA 92101
Telephone (619) 525-0035
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October 2, 2002

BY FAX: (858) 571-6972
Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: **CONTEST OF ADDITION OF CALDWELL FAMILY TRUST TO ADDENDUM NO. 1 TO CLEANUP AND ABATEMENT ORDER NO. 2001-226**
28111 Front Street, Temecula, CA

Dear Regional Water Quality Control Board:

I represent the Caldwell Family Trust ("Caldwells"). The Caldwells hereby contest their inclusion as a responsible party on the C&AO described above for equitable reasons. The Caldwells request the board set a hearing to discuss their concerns.

Their contest is based on the existence of other responsible parties who are responsible for the release of petroleum hydrocarbons at the site and who are complying in a timely manner with the C&AO. The Caldwells are innocent landowners who have never owned or operated the underground tanks and whose tenants are the sole cause of all contamination.

The inclusion of the Caldwells on the C&AO will result in significant added expense to the Caldwells, even though the other responsible parties are complying, and express an intent and ability to continue to comply, with the order. The Caldwells, in turn, are seeking all expenses they are incurring in addressing the contamination at the site, along with attorneys fees, by way of indemnification from all the other responsible parties named on the C&AO, as allowed by their lease. Such significant increase in indemnity demanded could ravage limited resources of the other responsible parties from accomplishing the priority goal here, remediation, as well as reimbursing the Caldwells for their expenses.

Regional Water Quality Control Board
Re: Addendum No. 1 to Cleanup and Abatement Order no. 2001-226
October 2, 2002

As long as the real parties responsible for contaminating the Caldwell's property are complying in a timely manner with the C&AO, the Caldwells request they be removed from such order, unless and until the other responsible parties fail to comply with the C&AO.

The Caldwells thank you for your consideration in this matter.

Very truly yours,

JOHN H. REAVES, A.P.C.
John H. Reaves, Esq.

cc: client by fax

Item 11
Sup. Doc 2

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

ADDENDUM NO. 1
TO
CLEANUP AND ABATEMENT ORDER NO. 2001-226

KANWAR AND RAGINI NARAIN

NARAIN OIL INCORPORATED

AJKERAKA INCORPORATED

CALDWELL FAMILY TRUST

SUMMIT ENERGY CORPORATION

SUMMIT OIL & GAS

28111 FRONT STREET
TEMECULA CALIFORNIA
RIVERSIDE COUNTY

The California Regional Water Quality Control Board, San Diego Region (hereinafter the Regional Board) finds that:

1. Kanwar and Ragini Narain, Narain Oil Inc., and Ajkeraka Inc. (Narain) are required to cleanup and abate petroleum wastes at 28111 Front Street, Temecula, California, under Cleanup and Abatement Order (CAO) No. 2001-226; findings therein are incorporated herein. This addendum supplements, and, to the extent of any inconsistency, supersedes CAO No. 2001-226.

2. Analysis of groundwater samples from the gasoline station at 28111 Front Street in Temecula collected during March 2001 show pollution of groundwater by diesel range petroleum hydrocarbons (diesel).

3. On April 17, 2002, an enhanced leak detection test on the underground storage tank (UST) system indicated that liquid was leaking from the piping connecting the diesel storage tank to the diesel dispenser at the station. The unauthorized discharge of diesel at the property has created a condition of pollution in the underlying groundwater aquifer as defined by the California Water Code section 13050.

4. A diesel plume has co-mingled with a known plume of gasoline that was discovered in 1994 when the station was owned and operated by Narain. Narain is required to cleanup waste and abate existing and threatened pollution associated with discharge of gasoline waste at the site by CAO No. 2001-226. In the areas where the plumes are co-mingled, it is infeasible to cleanup and abate each individual plume separately.

5. The Caldwell Family Trust (Caldwell) has owned the property at 28111 Front Street continuously since the gasoline discharge was discovered in 1994 until the present. Caldwell caused or permitted discharges of petroleum wastes to groundwater beneath the property because it owns the contaminated land from which wastes are discharging to groundwater. Further, Caldwell had knowledge of the discharge of gasoline waste since as early as November 2000 and had sufficient control of the property to stop the discharge.

6. On or about December 1, 1998, Summit Energy Corporation leased the property at 28111 Front Street in Temecula from Caldwell in order to operate the retail gasoline station on the property, at which diesel fuel was stored and dispensed. Summit Energy Corporation owned and operated the UST system at the station in March 2001 when monitoring data showed the presence of diesel pollution in the groundwater beneath the station. The presence of diesel in the groundwater samples indicates a leak in the diesel storage/dispensing portion of the UST system at the station. As the owners and operators of the UST system, Summit Energy Corporation caused or permitted the discharge of diesel waste to the groundwater.

7. Summit Oil & Gas operated the UST system at 28111 Front Street in Temecula, California when a leak in the diesel piping was discovered in April 2002. As the operator of the UST system Summit Oil & Gas, caused or permitted the discharge of diesel waste to the groundwater

8. Other persons currently unknown to the Regional Board may have owned or operated the UST system and may have caused or permitted discharges to groundwater at 28111 Front Street in Temecula, California.

9. CEQA: This action is an order to enforce the laws and regulations administered by the Board. As such, this action is categorically exempt from the provisions of the California Environmental Quality Act (CEQA) pursuant to section 15308 of the Resources Agency Guidelines.

IT IS HEREBY ORDERED, pursuant to sections 13267 and 13304 of the California Water Code:

1. Kanwar and Ragini Narain, Narain Oil Incorporated, Ajkeraka Incorporated, Summit Energy Corporation, Summit Oil & Gas, and the Caldwell Family Trust (dischargers), or their agents, successors, or assigns, shall take action to cleanup petroleum hydrocarbon wastes and abate the effects on groundwater of discharges of petroleum hydrocarbons that leaked from the UST systems of the gasoline service station at 28111 Front Street in Temecula, California.

2. The dischargers shall coordinate investigative, monitoring and cleanup activities, commencing with an updated site conceptual model and a Corrective Action Plan (CAP) for the unauthorized discharge of gasoline and the unauthorized discharge of diesel to groundwater.

   Regarding technical and monitoring reports required by this order, the scope of said reports shall encompass the entire discharge including pollution associated with either gasoline or diesel waste. Reports dealing only with the gasoline or the diesel pollution are not acceptable.

A. TASKS

3. **The following is added to Directive A.3 of CAO No. 2001-226:**

   Furthermore, the dischargers shall submit an updated site conceptual model to the Regional Board no later than **October 21, 2002.**

5. **The following is added to Directive A.5 of CAO No. 2001-226:**

   Furthermore, one Corrective Action Plan, that adequately address all the issues created by the unauthorized releases, shall be received by the Regional Board no later than **December 16, 2002.**

JOHN. H. ROBERTUS
Executive Officer

Date issued: September 6, 2002

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

CLEANUP AND ABATEMENT ORDER NO. 2001-226

FORMER DELTA DISCOUNT GAS STATION
28111 FRONT STREET
TEMECULA, CA

The California Regional Water Quality Control Board, San Diego Region (hereinafter Regional Board) finds that:

1. **Unauthorized Discharge of Waste**: In 1994, an unauthorized discharge of petroleum hydrocarbon waste to soil and groundwater occurred at the former Delta Discount gas station, located at 28111 Front Street in Temecula, Riverside County, California. The waste was discharged from the station's underground storage tank system and resulted in a condition of pollution in the underlying groundwater aquifer.

   The property where the waste was discharged is also described as: Lot 9 of Tract 3751 in the County of Riverside, State of California, as per map recorded in Book 59, Pages 38, 39, and 40 of Maps, in the office of the County Recorder of said County.

2. **Parties Responsible for the Discharge**: Kanwar and Ragini Narain, Narain Oil Inc., and Ajkeraka Oil Inc (hereinafter discharger) are the parties responsible for the discharge. The discharger owned and operated the former Delta Discount Gas Station at 28111 Front Street in Temecula from 1990-1997. On January 30, 1990, Kanwar and Ragini Narain entered into a lease of the above-mentioned property. On February 15, 1994, Kanwar and Ragini Narain entered into an amended lease as officers of Narain Oil Inc. On December 8, 1995, Kanwar and Ragini Narain entered into an amended lease as officers of Ajkeraka Inc.

   As the owner and operator of the underground storage tank system, the discharger caused the initial discharge of petroleum hydrocarbon waste to soil and groundwater at the station in 1994. Since then, the discharger has permitted the discharge to continue by allowing the waste to migrate offsite into uncontaminated portions of the aquifer. The continued discharge has occurred because of the discharger's lack of action to assess and remediate the effects of the initial discharge.

3. **Condition of Pollution**: The property at which the petroleum hydrocarbon waste was discharged is located in the Murrieta hydrologic subarea. This subarea has designated beneficial uses for both surface waters and groundwaters, including municipal and domestic supply. The property lies above an aquifer that is used as a drinking water source. A public supply well that was shut down by the California Department of Health Services (DHS) in September 2000 due to MTBE contamination is downgradient and within 1,000 feet of the discharge.

Gasoline, benzene, toluene, ethylbenzene, xylene, methyl-tertiary-butyl-ether (MTBE), tertiary butyl alcohol (TBA) and tertiary amyl methyl ether (TAME) have been discharged to the groundwater beneath the site in concentrations that exceed naturally occurring background concentrations and applicable water quality objectives. The concentrations of contaminants also exceed the maximum contaminant levels (MCL) allowable in drinking water set by the DHS. Floating free-phase petroleum product on the water table continues to exist. The concentrations of petroleum hydrocarbons and petroleum hydrocarbon constituents have degraded the quality of groundwater and impaired the designated beneficial uses of the waters as defined in the Water Quality Control Plan for the San Diego Basin creating a condition of pollution.

4. **CEQA**: This action is an order to enforce the laws and regulations administered by the Board. As such, this action is categorically exempt from the provisions of the California Environmental Quality Act (CEQA) pursuant to section 15308 of the Resources Agency Guidelines.

IT IS HEREBY ORDERED, pursuant to section 13304 of the California Water Code, that the discharger shall cleanup and abate the effects of the discharge described in the above findings as follows:

A. **TASKS**

1. **Interim Remedial Actions**: The discharger shall implement interim remedial actions to abate or correct the actual or potential effects of the unauthorized release pursuant to CCR Title 23, Chapter 15, section 2722(b). Interim remedial actions may include but are not limited to: activities that remove all free product, removal of petroleum hydrocarbon sources (e.g. soil saturated with petroleum hydrocarbons) and/or mitigation of contamination of all surface and groundwater affected by the waste discharge. Thirty days prior to initiating any interim remedial actions, the discharger shall notify the Regional Board in writing with a proposed workplan and schedule. The discharger shall implement the interim remedial actions within 30 days of submitting the workplan to the Regional Board.

2. **Groundwater Monitoring**: The discharger shall implement a quarterly groundwater monitoring program as specified in Enclosure 1 at the site commencing with the quarterly report due on **January 31, 2002.**

3. **Site Conceptual Model**: The discharger shall submit a site conceptual model (SCM). The SCM is a written or pictorial representation of the release scenario and the likely distribution of waste at the site. The SCM shall identify and describe the types of waste present including their distribution in space and time, and how the wastes are changing in space and time.

The SMC shall also identify the potential, current ant future receptors in the area; link potential sources to potential receptors through transport of wastes in the air, soil and water; and identify the fate and transport characteristics of the site. It should describe or show the physical characteristics and properties of the subsurface and identify the environmental issues that need to be investigated (and those issues that do not need to be addressed).

The SCM shall be updated as new information becomes available, and should be included in all future technical reports submitted. The first SCM is due no later than **January 31, 2002.**

4. **Soil And Groundwater Investigation**: Continue the investigation currently underway to identify all wastes from the discharge and the horizontal and vertical extent of the wastes both on and off site to background levels in both the groundwater and soil. Determine the source, and nature of the discharge in the subsurface, and evaluate the impacts of the wastes on all sensitive receptors within 3,000 feet of the discharge. An adequate workplan and schedule for the next phase of this investigation is due on **January 31, 2002.**

   The discharger shall execute the workplan and provide a technical report with the results from implementation of the workplan. Implementation of the workplan will commence no later than 60 days after submission of an adequate workplan. Within 60 days of the conclusion of the investigation a technical report that adequately characterizes the source, nature and extent (both laterally and vertically) of the discharge and addresses any contamination that has migrated off-site shall be submitted. The information in the report must provide an adequate basis for determining subsequent cleanup and abatement actions.

5. **Corrective Action**: The discharger shall prepare a Corrective Action Plan (CAP) that satisfies the provisions of section 2725 of the regulations governing underground storage of hazardous substances (Chapter 16 of the State Water Resources Control Board regulations in Division 3 of Title 23 of the California Code of Regulations, 23 CCR 2600, et seq.). The CAP shall identify and discuss a range of remedial action alternatives for the final phase of the cleanup program including a schedule. The CAP shall examine and determine the cost of a cleanup strategy capable of achieving final cleanup levels in the affected groundwater zones for the following constituents: benzene, toluene, total xylenes, ethylbenzene, methyl tertiary butyl ether, tertiary butyl alcohol and any other waste which may have been released by the discharger. All free phase petroleum hydrocarbon product must be removed and any sources of petroleum hydrocarbon wastes must be removed. Implementation of the CAP will commence no later than 60 days after submission of the CAP to the Regional Board. Within 60 days of the conclusion of the investigation a technical report with the results to verify implementation of the CAP and evaluate its effectiveness shall be submitted to the Regional Board.

B. PROVISIONS

1. **No Nuisance**: The storage, handling, treatment, or disposal of soil containing petroleum hydrocarbon waste or polluted groundwater shall not create conditions of nuisance as defined in California Water Code section 13050(m). The discharger shall properly manage, treat and dispose of soils containing petroleum hydrocarbon waste and polluted groundwater in accordance with applicable federal, state and local regulations.

2. **Good Operation and Maintenance**: The discharger shall maintain in good working order and operate as efficiently as possible any facility or control system installed to achieve compliance with the requirements of this Order.

3. **Ground-Water Monitoring Program**: The discharger shall comply with the Ground-Water Monitoring Program enclosed with this Order.

4. **Contractor/Consultant Qualifications**: All technical documents shall be signed by and stamped with the seal of a California registered geologist, or a California registered civil engineer.

5. **Lab Qualifications**: All samples shall be analyzed by California State-certified laboratories using approved EPA methods for the type of analysis to be performed. All laboratories shall maintain quality assurance/quality control (QA/QC) records for Regional Board review.

6. **Reporting of Changed Owner or Operator**: The discharger shall notify the Regional Board of any changes in site occupancy or ownership associated with the property described in this Order.

7. **Cost Recovery**: The discharger shall reimburse the State for all reasonable costs actually incurred by the Regional Board to investigate unauthorized discharges of waste and to oversee cleanup of such waste, abatement of the effects thereof, or other remedial action, required by this Order, according to billing statements prepared from time to time by the State Water Resources Control Board. If the discharger is enrolled in a reimbursement program managed by the State Water Resources Control Board for the discharge addressed by this Order, reimbursement shall be made pursuant to the procedures established in that program. Any disputes raised by the discharger over reimbursement amounts or methods used in that program shall be consistent with the dispute resolution procedures for that program.

C. PROHIBITIONS

1. The discharge of wastes or hazardous substances in a manner that will degrade water quality or adversely affect the water quality needed to sustain beneficial uses of waters of the State is prohibited.

2. Further significant migration of wastes or hazardous substances through subsurface transport to waters of the State is prohibited.

3. Activities associated with the subsurface investigation and cleanup, which will cause significant adverse migration of wastes or hazardous substances, are prohibited.

JOHN H. ROBERTUS
Executive Officer
California Regional Water Quality Control Board
San Diego Region

FAILURE TO COMPLY WITH THE REQUIREMENTS OF THIS ORDER MAY SUBJECT YOU TO ENFORCEMENT ACTION, INCLUDING BUT NOT LIMITED TO: IMPOSITION OF ADMINISTRATIVE CIVIL LIABILITY UNDER WATER CODE SECTIONS 13268 OR 13350, OR REFERRAL TO THE ATTORNEY GENERAL FOR INJUNCTIVE RELIEF OR CIVIL OR CRIMINAL LIABILITY

Enclosure: Quarterly Groundwater Monitoring Program

ENCLOSURE 1

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

QUARTERLY GROUNDWATER MONITORING PROGRAM

FORMER DELTA DISCOUNT GAS
28111 Front Street
Temecula, CA

1. **AUTHORITY AND PURPOSE**: The discharger is directed to submit the technical reports required in this Groundwater Monitoring Program (GMP) pursuant to California Water Code sections 13267 and 13304. This Groundwater Monitoring Program is intended to document compliance with Cleanup and Abatement Order No. 2001-226.

2. **MONITORING**: The discharger shall measure groundwater elevations quarterly in all monitoring wells, and shall collect and analyze samples of groundwater from all monitoring wells using EPA method 8015 for total petroleum hydrocarbons quantifying gasoline and diesel and EPA method 8260b for volatile organic compounds including benzene, toluene, ethylbenzene, xylenes, and all oxygenates. In the first round of groundwater sampling from each well use EPA Method 8270 to identify any polynuclear aromatic hydrocarbons in the samples. The California Regional Water Quality Control Board, San Diego Region (Regional Board) will determine the need for further data from EPA Method 8270 after reviewing the preliminary data.

   The discharger shall sample any new monitoring or extraction wells quarterly and analyze groundwater samples for the same constituents as shown above. The discharger may propose changes in the above sampling requirements; any proposed changes are subject to Regional Board approval.

3. **QUARTERLY GROUNDWATER MONITORING REPORTS**: The discharger shall submit quarterly groundwater monitoring reports to the Regional Board no later than 30 days following the end of the quarter according to the following schedule:

First Quarter (Jan-Mar)	Due no later than April 30
Second Quarter (Apr-Jun)	Due no later than July 31
Third Quarter (Jul-Sep)	Due no later than October 31
Fourth Quarter (Oct-Dec)	Due no later than January 31

This schedule shall commence with the submission of a quarterly monitoring report due on **January 31, 2002.**

The quarterly monitoring reports shall include:

- **TRANSMITTAL LETTER**: The transmittal letter shall discuss any violations during the reporting period and actions taken or planned to correct the problem. The letter shall be signed by the discharger's principal executive officer or his/her duly authorized representative, and shall include a statement by the official, under penalty of perjury, that the report is true and correct to the best of the official's knowledge.

- **GROUNDWATER ELEVATIONS**: Groundwater elevation data shall be presented in tabular form, depth to groundwater, top of casing elevations, depths to the top of well screens, length of well screens and total depth for each well included in the monitoring program. For all wells containing floating free petroleum product (LNAPL) include the measured thickness of LNAPL in a tabular form. A groundwater elevation map should be prepared for each monitored water-bearing zone with the groundwater flow direction and calculated hydrologic gradients(s) clearly indicated in the figures(s). Historical groundwater elevations shall be included in the fourth quarterly report each year.

- **REPORTING GROUNDWATER RESULTS**:

  - Groundwater sampling data shall be presented in tabular form, and an isoconcentration map shall be prepared for constituents of concern (COCs) for each monitored water-bearing zone, as appropriate. Time versus concentration plots and distance versus concentration plots that include groundwater elevation shall be prepared for constituents of concern for appropriate wells.
  - Provide a site plot plan which clearly illustrates the locations of monitoring wells, former/current underground storage tank systems (and product piping) and buildings located on site and immediately adjacent to the property lines of the site.
  - Provide a site plot plan with the most recent concentrations of total petroleum hydrocarbons and volatile aromatic hydrocarbons (e.g. benzene, toluene, ethylbenzene, total xylenes, MTBE, and other fuel oxygenates).
  - The report shall provide technical interpretations of the groundwater data, and describe any significant increases in contaminant concentrations since the last report, any measures proposed to address the increases, any changes to the site conceptual model, and conclusions and recommendations for future action with each report.
  - The report shall describe analytical methods used, detection limits obtained for each reported constituent, and a summary of QA/QC data.

- The report shall indicate sample collection protocol, describe how investigation derived wastes are managed at the site, and include documentation of proper disposal of contaminated well purge water and/or soil cuttings removed from the site.
- Historical groundwater sampling results shall be put in tabular form and included in the fourth quarterly report each year.
- Sampling data shall be submitted via the internet to the GeoTracker data warehouse in the appropriate electronic deliverable format according to the schedule in item 3 above. The GeoTracker website address is http://geotracker.swrcb.ca.gov.

- **GROUNDWATER EXTRACTION**: If applicable, the report shall include groundwater extraction results in tabular form, for each extraction well and for the site as a whole, expressed in gallons per minute and total groundwater volume for the quarter. The report shall also include contaminant removal results, from groundwater extraction wells and from other cleanup and abatement systems (e.g. soil vapor extraction), expressed in units of chemical mass per day and mass for the quarter. Historical mass removal results shall be included in the fourth quarterly report each year.

- **STATUS REPORT**: The quarterly report shall describe relevant work completed during the reporting period (e.g. site investigation, interim remedial measures) and work planned for the following quarter.

4. **VIOLATION REPORTS**: If the discharger violates requirements in the Cleanup and Abatement Order, then the discharger shall notify the Regional Board office by telephone as soon as practicable once the discharger has knowledge of the violation. Regional Board staff may, depending on violation severity, require the discharger to submit a separate technical report on the violation within five working days of telephone notification.

5. **OTHER REPORTS**: The discharger shall notify the Regional Board in writing prior to any site activities, such as construction or underground tank removal, which have the potential to cause further migration of contaminants or which would provide new opportunities for site investigation.

6. **RECORD KEEPING**: The discharger or his/her agent shall retain data generated for the above reports, including lab results and QA/QC data, for a minimum of six years after origination and shall make them available to the Regional Board upon request.

7. **GROUNDWATER MONITORING PROGRAM REVISIONS**: Revisions to the GMP may be ordered by the Regional Board, or at the request of the discharger. Prior to making GMP revisions, the Regional Board will consider the burden, including costs, of associated self-monitoring reports relative to the benefits to be obtained from these reports.

JOHN H. ROBERTUS
Executive Officer
California Regional Water Quality Control Board
San Diego Region

ITEM 17
Sup Doc 3

AMENDMENT OF LEASE

This Amendment of Lease is entered into as of December 1, 1998 by and between The Caldwell Family Trust and Summit Energy Corporation, a California corporation.

RECITALS:

H. L. Caldwell and Nancy L. Caldwell, Trustees of the Caldwell Family Trust established September 25, 1980, are the lessor ("Lessor"), and Summit Energy Corporation is the assignee and lessee ("Lessee"), under the Amended and Restated Ground Lease, dated as of November 1, 1995 (the "Lease") with respect to the real property located in the City of Temecula, County of Riverside, State of California, described as follows:

> Lot 9 of Tract 3751 in the County of Riverside, State of California, as per map recorded in Book 59, Pages 38, 39 and 40 of Maps, in the Office of the County Recorder of said County,

and more commonly known as 28111 Front Street, Temecula, California 92590, for an Initial Term beginning on November 1, 1995 and ending on October 31, 2000, together with options by Lessee to extend the term as therein provided.

Lessor and Lessee hereby agree to amend the Lease as follows:

1. Paragraph 1(b) of the Lease entitled "Improvements" is amended by deleting the words "and all furniture and furnishings" from the second sentence of that paragraph beginning on the third from last line and following the word "foregoing".

2. A new Paragraph 1(e) is added as follows:

"(e) Trade Fixtures. "Trade Fixtures" means all machinery, partitions, furniture, furnishings, doors, bins, racks, floor coverings, special lighting fixtures, gasoline pumps, water pumps, exterior and interior signs, and other equipment and personal property installed or placed on the Premises that can be removed without injury to the Premises or Improvements."

3. Section 3 of the Lease entitled "Term" is deleted in its entirety, and the following is substituted in its place and stead:

"3. Term. The term of this Lease shall be extended for the twenty-five (25) year period beginning December 1, 1998 and ending November 30, 2023. Lessee acknowledges that such

AMENDED AND RESTATED GROUND LEASE, DATED AS OF NOVEMBER 1, 1995, BETWEEN THE CALDWELL FAMILY TRUST AND MICHAEL R. MCMILLAN, AS LESSOR AND AJKERAKA, INC., A CALIFORNIA CORPORATION, AS LESSEE

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amendments or successor(s) thereto, replacements thereof or publications promulgated pursuant thereto (collectively "Environmental Laws"). In addition to the foregoing, the term "Environmental Laws" shall be deemed to include, without limitation, local, state and federal laws, judgments, ordinances, orders, rules, regulations, codes and other governmental restrictions, guidelines and requirements, any amendments and successors thereto, replacements thereof and publications promulgated pursuant thereto, which deal with or otherwise in any manner relate to, air or water quality, air emissions, soil or ground conditions or other environmental matters of any kind.

(b) Hazardous Materials. Lessee agrees that during the term of this lease Lessee shall use and store only those Hazardous Materials on the Premises which are necessary for Lessee's business and that such usage and storage is in full compliance with Environment Laws, and all judicial and administrative decisions pertaining thereto.

(c) Hazardous Materials Report; When Required. Lessee shall submit to Lessor a written report with respect to Hazardous Materials ("Report") in the form prescribed in subparagraph (d) below on the following dates:

(i) Within ten (10) days after the date of this Lease;

(ii) Within ten (10) days after each anniversary of the date of this Lease during the term;

(iii) At any time within ten (10) days after written request by Lessor; and

(iv) At any time when there has been or is planned any condition which constitutes or would constitute a change in the information submitted in the most recent Report, including any notice of violation as referred to in subparagraph (d)(v) below.

(d) Hazardous Materials Report; Contents. The Report shall contain, without limitation, the following information:

(i) Any governmental permits maintained by Lessee with respect to such Hazardous Materials, the issuing agency, original date of issue, renewal dates (if any) and expiration date. Copies of any such permits and applications therefor shall be attached.

(ii) Any governmental reporting or inspection requirements with respect to such Hazardous Materials, the governmental agency to which reports are made and/or which conducts inspections, and the dates of all such reports and/or inspections (if applicable) since the last Report. Copies of any such Reports shall be attached.

(iii) Identification of any operation or business plan prepared for any government agency with respect to Hazardous Use.

(iv) Any liability insurance carried by Lessee with respect to Hazardous Materials, the insurer, policy number, date of issue, coverage amounts, and date of expiration. Copies of any such policies or certificates of coverage shall be attached.

(v) Any notices of violation of Environmental Laws, written or oral, received by Lessee from any governmental agency since the last Report, the date, name of agency, and description of violation. Copies of any such written notices and shall be attached.

(vi) Any knowledge, information or communication which Lessee has acquired or received relating to (a) any action threatened or commenced against Lessee or with respect to the Premises pursuant to any Environmental Laws; (b) any claim made or threatened by any person or entity against Lessee or claimed to result from any alleged Hazardous Use on or about the Premises; or (c) any report, notice or complaint made to or filed with any governmental agency concerning any Hazardous Use on or about the Premises. The Report shall be accompanied by copies of any such claim, report, complaint, notice, warning or other communication that is in the possession of or is available

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to Lessee.

(vii) Such other pertinent information or documents as are requested by Lessor in writing.

(e) Release of Hazardous Materials; Notification and Cleanup. If at any time during the term Lessee knows or believes that any release of any Hazardous Materials has come on or will be located upon, about or beneath the Premises, then Lessee shall immediately, either prior to the release or following the discovery thereof by Lessee, give verbal and follow-up written notice of that condition to Lessor. Lessee covenants to investigate, clean up and otherwise remediate any release of Hazardous Materials at Lessee's cost and expense; such investigation, cleanup and remediation shall be performed only after Lessee has obtained Lessor's written consent, which shall not be unreasonably withheld; provided, however, that Lessee shall be entitled to respond immediately to an emergency without first obtaining Lessor's written consent. All clean-up and remediation shall be done in compliance with Environmental Laws and to the reasonable satisfaction of Lessor. Notwithstanding the foregoing, whether or not such work is prompted by the foregoing notice from Lessee or is undertaken by Lessor for any other reason whatsoever, Lessor shall have the right, but not the obligation, in Lessor's sole and absolute discretion, exercisable by written notice to Lessee at any time, to undertake within or outside the Premises all or any portion of any investigation, clean-up or remediation with respect to Hazardous Materials (or, once having undertaken any of such work, to cease same, in which case Lessee shall perform the work), all at Lessee's cost and expense, which shall be paid by Lessee as additional rent within ten (10) days after receipt of written request therefor by Lessor (and which Lessor may require to be paid prior to commencement of any work by Lessor). No such work by Lessor shall create any liability on the part of Lessor to Lessee or any other party in connection with such Hazardous Materials or constitute an admission by Lessor of any responsibility with respect to such

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Hazardous Materials. It is the express intention of the parties hereto that Lessee shall be liable under this Paragraph 28 for any and all conditions covered hereby which were caused or created by any person or entity whatsoever (except Lessor) whether such condition occurred, was created or caused or existed prior to or after the execution of this Lease and/or prior to or after Lessee's possession of the Premises. Lessee shall not enter into any settlement agreement, consent decree or other compromise with respect to any claims relating to any Hazardous Materials in any way connected to the Premises without first (i) notifying Lessor of Lessee's intention to do so and affording Lessor the opportunity to participate in any such proceedings, and (ii) obtaining Lessor's written consent.

(f) Inspection and Testing by Lessor. Lessor shall have the right at all times during the term of this Lease to (i) inspect the Property, as well as Lessee's books and records, and to (ii) conduct tests and investigations to determine whether Lessee is in compliance with the provisions of this paragraph. Except in case of emergency, Lessor shall give reasonable notice to Lessee before conducting any inspections, tests, or investigations. The cost of all such inspections, tests and investigations shall be borne by Lessee, if Lessor reasonably believes them to be necessary. Neither any action nor inaction on the part of Lessor pursuant to this Paragraph 28(f) shall be deemed in any way to release Lessee from, or in any way modify or alter, Lessee's responsibilities, obligations, and/or liabilities incurred pursuant to this Paragraph 28.

(g) Indemnity. Lessee shall indemnify, hold harmless, and, at Lessor's option (with such attorneys as Lessor may approve in advance and in writing), defend Lessor and Lessor's officers, directors, shareholders, partners, employees, contractors, agents and mortgagees or other lien holders, from and against any and all claims, demands, expenses, actions, judgments, damages (whether consequential, direct or indirect, known or unknown, foreseen or unforeseen), penalties, fines,

liabilities, losses of every kind and nature (including, without limitation, property damages, diminution in value of Lessor's interest in the Premises, damages for the loss or restriction on use of any space or amenity within the Property, sums paid in settlement of claims and any costs and expenses associated with injury, illness or death to or of any person), suits, administrative proceedings, costs and fees, including, but not limited to, attorneys' and consultants' fees and expenses, and the costs of cleanup, remediation, removal and restoration (all of the foregoing being hereinafter sometimes collectively referred to as "Losses"), arising from or related to any violation or alleged violation of any of the requirements, ordinances, statutes, regulations or other laws referred to in this Paragraph, including, without limitation Environmental Laws, any breach of the provisions of this paragraph, or any Hazardous Use on, about or from the Property caused by the acts or omissions of any persons or entities whatsoever, whether related or unrelated to Lessee, including without limitation any Hazardous Use or release Hazardous Materials arising, occurring or existing prior to the execution of this Lease and/or Lessee's possession of the Property. Lessee warrants that it is leasing the Premises and the Property "as-is, where-is," that it has thoroughly inspected the Premises and the Property prior to execution of this Lease, and that it intends to act as an insurer with respect to any Hazardous Use on, under or about the Premises or Property.

(h) California Underground Storage Tank Cleanup Fund. At all times during the term of this Lease, Lessee shall maintain eligibility for and participate in the California Underground Storage Tank Cleanup Fund program with respect to the Premises and Improvements as provided for in Chapter 6.75 of the California Health and Safety Code. Upon the request of Lessor, Lessee shall provided to Lessor written evidence satisfactory to Lessor of Lessee's good standing as a participant in the Fund program. In event that at any time Lessee's participation in the

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Fund program shall terminate or that participation in the Fund program shall not continue to be available to Lessee for any reason, before the effective date of the termination of Lessee's participation in Fund program, Lessee at its own cost and expense shall obtain insurance coverage for any property damage, clean-up costs to the Premises, Improvements and the property of third parties and third party personal injury and property damage liability in any way related to the storage, use or sale of petroleum products on the Premises and the Property in an amount not less than $1,000,000.00 per occurance in a form and issued by an insurance carrier licensed to do business in the State of California and satisfactory to Lessor.

(i) Release and Assumption of Risk.

(i) Lessee, for itself, and its officers, directors, shareholders, partners, agents, contractors, attorneys, brokers, servants, employees, sublessees, lessees, invitees, concessionaires, licenses and representatives (hereinafter referred to as ("Releasors"), hereby waives, releases, acquits and forever discharges Lessor and its officers, directors, shareholders, partners, agents, contractors, attorneys, brokers, servants, employees, invitees, licensees and representatives (hereinafter referred to as "Releases") of and from any and all losses, which are in any way connected with, based upon, related to or arising out of (i) any Hazardous Use or Hazardous Materials on or about the Premises or Property, (ii) any violation by or relating to the Premises or Property (or the ownership, use, condition, occupancy or operation thereof), or by the Releasors or any other persons or entities, of any Environmental Laws affecting the Premises or Property, or (iii) any investigation, inquiry, order, hearing, actions or other proceeding by or before any governmental agency or any court in connection with any of the matters referred to in clauses (i) or (ii) above (collectively, the "Release Matters"), except to the extent caused by the gross negligence or willful misconduct of the Releases. Releasors hereby expressly assume any and all risk

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(Cite as: 1986 WL 25502 (Cal.St.Wat.Res.Bd.))

State Water Resources Control Board
State of California

*1 IN THE MATTER OF THE PETITION OF
ZOECON CORPORATION
ORDER NO. WQ 86-2
February 20, 1986

For Review of Order No. 85-67 of the California Regional Water Quality Control Board, San Francisco Bay Region. Our File No. A-397 .

BY THE BOARD:

On May 15, 1985, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board) adopted waste discharge requirements (Order No. 85-67) for a five-acre industrial site in East Palo Alto. Both Zoecon Corporation, the current owner of the property, and Rhone-Poulenc, Inc., a former owner of the Site, were named as dischargers in the requirements. On June 14, 1985, the State Board received a petition from Zoecon Corporation (petitioner) asserting that Zoecon was improperly named as a discharger in the order.

I. BACKGROUND

Before discussing the issue raised on appeal, it is helpful to briefly review the history of the site.

Prior to 1926, the property in question was occupied by Reed Zinc Company whose activities are unknown. From 1926 to 1964 the site was occupied by Chipman Chemical Company for the production and formulation of pesticides and herbicides including sodium arsenite compounds. In 1964, Rhodia Inc. acquired Chipman and its operations . In 1971 the Chipman operation was shut down and the following year the property was sold to Zoecon Corporation. Rhodia subsequently changed its name to Rhone-Poulenc, Inc. in 1978. Zoecon has occupied the site from 1972 to the present for the purpose of formulating and manufacturing insect control chemicals.

Sodium arsenite was formulated by Chipman and Rhodia in an underground tank located along a railroad spur. Some of the wastes from this process were disposed of in a shallow sludge pond located on the northeast portion of the property. Contaminated surface runoff from the site has discharged and still poses a potential to discharge onto adjoining land including a non-tidal marsh.

Zoecon Corporation contends that the chemicals used in their manufacturing and formulating operations are unrelated to the

contaminants found on the site. Chipman Chemical Company and Rhodia, Inc. are known to have produced arsenical pesticides at that site and the Regional Board found that they are the probable source of of the contaminants found in the soil and ground water both onsite and on adjacent properties. Zoecon Corporation has legal title to the site where the contaminants are concentrated however and the Regional Board therefore concluded that the petitioner has certain legal responsibility for any investigation or remedial action.

In fact, initial site investigations were conducted in 1981 by Zoecon. They revealed heavy metal contamination of the soil and ground water (including arsenic, lead, cadmium, selenium and mercury) in excess of background levels. The Regional Board adopted a cleanup and abatement order and several subsequent revisions to it, requiring both Rhone-Pulenc, Inc. and Zoecon Corp. to determine the lateral and vertical extent of heavy metals and organic compounds in the soil and ground water both on and off-site. The cleanup and abatement order also required the dischargers to submit and implement remedial measures to mitigate the contamination.

***2** The two companies did not recommend similar mitigation alternatives since they have differing opinions about the appropriate level of cleanup. Therefore, the waste discharge requirements do not require the implementation of a specific mitigation plan but, instead, establish a required level of clean up .

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner contends that it cannot be classified as a 'discharger' under applicable sections of the Water Code because Zoecon never discharged, deposited or in any way contributed to the contamination of the property.

Finding: Waste discharge requirements were adopted by the Regional Board pursuant to Water Code s 13263(a) which states, in pertinent part, that 'the regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge or material change therein . . ..' Petitioner argues that there is no factual or legal basis for the contention that there is an ongoing 'discharge' of waste at the site such that waste discharge requirements may be issued.

Factually, petitioner argues that the soil and ground water contamination is in a relatively steady state due to the low mobility characteristic of arsenic in soils. Petitioner also points out that one consultant has estimated that at current flow rates it will take 1,000 years for the contaminated ground water to discharge to San Francisco Bay which is about 2,000 feet west of the site. [FN1] Even if this calculation is accurate, such movement of contamination, albeit slow, is still a discharge to waters of the state that must be regulated. In addition, ground water quality in the shallow zone has been degraded and existing and potential beneficial uses of currently uncontaminated ground water in the vicinity of the site within the shallow and deep

aquifers could be adversely affected if the spread of contamination remains uncontrolled. Therefore, we must conclude that there is an actual movement of waste from soils to ground water and from contaminated to uncontaminated ground water at the site which is sufficient to constitute a 'discharge' by the petitioner for purposes of Water Code s 13263(a).

We note also that although the petitioner argues that the contamination is in a relatively steady state, the petitioner's suggested remedial action plan actually calls for the excavation of all on-site soils having arsenic concentrations in excess of 500 ppm and the installation of a ground water extraction and treatment system to remove contaminants from the shallow ground water aquifer. This remedial plan, which is more stringent in its recommendations than the one proposed by Rhone-Poulenc, supports our contention that a discharge is continuing to occur which must be abated.

Petitioner cites U. S. v. Occidental Petroleum Corp., Civ. No. S-79-989 MLS (E.D. Cal. 1980) in support of its argument that the term 'discharge' as used in the Porter-Cologne Act is the act of depositing a contaminant and not the continuous leaching of the contaminant into ground water. We note, first of all, that this case has no value as precedent. It is an unpublished decision and could not be cited or relied on in a court of law. (Cal. Rules of Court, Rule 977.) In addition, it is a federal, as opposed to California, court decision. Furthermore, the situation reviewed in that case is not analogous to the issue before us today. In the Occidental Petroleum case, the court was construing Water Code s 13350 which concerns the imposition of penalties rather than the initial issuance of waste discharge requirements. Finally, unlike the situation in the Occidental Petroleum case, here the waste discharge requirements were imposed on Zoecon not because it had 'deposited' chemicals on to land where they will eventually 'discharge' into state waters, but because it owns contaminated land which is directly discharging chemicals into water. For all of these reasons, we decline to follow the reasoning of this case.

***3** Petitioner also relies on the California Superior Court opinion in People ex rel. Younger v. Superior Court 16 Cal.3d 34, 127 Cal.Rptr. 122 (1976). We do not find this decision, however, to be inconsistent with the Regional Board's determination that property owner is a discharger for purposes of issuing waste discharge requirements when wastes continue to be discharged from a site into waters of the state. In Younger the Court was concerned with the proper interpretation of Water Code s 13350(a)(3), which imposes a $6,000 per day penalty for each day in which a deposit of oil occurs. The Court held that this section imposes liability for each day in which oil is deposited in the waters of the state, not for each day during which oil remains in the water. In reaching this conclusion, the Court placed great reliance upon the fact that Harbors and Navigation Code s 151 [FN2] provides an adequate remedy for the cost of oil spill cleanup. The Court surmised, therefore, that the purpose of s 13350(a)(3) was not to address the concerns of the State

regarding the problems engendered by the size of an oil spill, the length of time the spill persists, or the costs of cleanup, but rather to provide an effective deterrent to those individuals who continuously cause oil spills. (Id., 16 Cal.3d at 44.)

Water Code s 13263(a) speaks to the issue of prescribing requirements for a 'proposed discharge, existing discharge, or material change therein.' Civil penalties are not at issue in the case before us today. An enforcement action is not being taken and there is no provision analogous to the Harbors and Navigation Code section relied on for the reasoning in the Younger case. The Younger case dealt simply with the issue of imposing liability for each day in which oil remains in waters of the state and as such is clearly distinguishable from the issue before us now. Finally, the Younger case interprets the word 'deposit' as used in Water Code s 13350(a)(3). The petitioner seems to imply that this term is synonymous with the word 'discharge' as used in Water Code s 13263(a) which we are considering today. Yet Water Code s 13350(a)(2) speaks to causing or permitting waste to the 'deposited' where it is 'discharged' into the waters of the state. Clearly, the words must mean different things or the Legislature would not have used both terms in s 13350(a)(2).

We note that the petitioner cites an Attorney General's opinion defining 'discharge' which arose from problems at abandoned mines in the State (26 Ops.Atty.Gen. 88, Opinion No. 55-116, (1955)). Petitioner argues that the decision is not on point because the conditions factually are quite different than in this instant case. The reasoning of the Opinion nonetheless is consistent with our conclusions herein. We note also that the opinion states:

'In the case of harmful drainage from inoperative or abandoned mines, the dischargers are the persons who now have legal control of the property from which such drainage arises. If the fee of the land where the mine is located is owned separately from the mineral rights, both the owner of the mineral rights in whose tunnels and shafts or dumps the water has picked up the material which has tainted it, and the owner of the fee from whose land the tainted water is permitted to pour out, are dischargers within the contemplation of the Dickey Act. By failing to take action which is within their legal power to halt the defilement of the drainage or to render it harmless by treatment before it departs their property, both are responsible for the deleterious discharge. It is immaterial that the mining operations may have terminated before either purchased his present interest because the discharge for which they are accountable is the existing and continuing drainage from their holdings, not the now discontinued mining.' (Id. at p. 90-91.)

***4** This is consistent with the conclusion in 27 Ops.Atty.Gen. 182 Opinion No. 55-236 (1956) regarding issuance of waste discharge requirements for inactive, abandoned or completed operations. The opinion concluded:

'The person upon whom the waste discharge requirements should be imposed to correct any condition of pollution or nuisance

which may result from discharges of the materials discussed above are those persons who in each case are responsible for the current discharge. In general, they would be the persons who presently have legal control over the property from which the harmful material arises, and thus have the legal power either to halt the escape of the material into the waters of the State or to render the material harmless by treatment before it leaves their property. Under this analysis, the fact that the persons who conducted the operations which originally produced or exposed the harmful material have left the scene does not free from accountability those permitting the existing and continuing discharge of the material into the waters of the State.' (Id. p. 185.)

Although both of these opinions interpret the Dickey Water Pollution Act which has been superseded by the Porter-Cologne Act, the relevant wording and intent of the statutes remains the same. In fact, in 63 Ops.Atty.Gen. 51, 56 (1980), it states:

'The legislative history of the Porter-Cologne Act clearly indicates that the previous Attorney General opinions on dirt run-off, mine tailing run-off and the responsibility of the present owner were intended to be incorporated in the definition of 'waste' under the Porter-Cologne Act.' [FN3]

2. Contention: The petitioner also argues that is is inequitable to impose requirements on Zoecon when the actual discharger is known and capable of performing the clean up.

Finding: We hasten to point out that neither the waste discharge requirements nor this order speak to the issue of apportioning responsibility between Zoecon and Rhone-Poulenc for the clean up of the site. There are other forums that provide a more appropriate setting for the resolution of that matter. In fact, we understand that Zoecon has initiated legal action in San Mateo Superior Court to get Rhone-Poulenc to compensate Zoecon for the damages and to declare Rhone-Poulenc responsible for the contamination. [FN4] In addition, liability will be apportioned among all potentially responsible parties as part of the Department of Health Services' development of a remedial action plan. (Health & Safety Code s 25356.3)

Issues regarding indemnity, the application of the doctrine of caveat emptor [FN5] or possible misrepresentation at the time of the sale of the property can not, and should not, be resolved by this Board. However, we do want to point out that we disagree with the petitioner's contention that as a policy matter requiring a present landowner to share responsibility for discharges of waste that began under a prior owner will undercut efforts to promote prompt disclosure and clean up of contaminated sites. The petitioner argues that this will encourage dischargers to conceal their actions in order to shift responsibility on to innocent purchasers of contaminated property. On the countrary, we believe that our determination that present property owners are also responsible for waste discharges will encourage potential buyers to more thoroughly examine the condition of property which they may acquire. Zoecon states that it purchased the property in 1972 and conducted an environmental audit of it in 1980. If the audit had taken place

prior to the purchase of the property, it is most probable that this matter would not be before us today.

*5 In addition, the petitioner characterizes itself as the 'mere landowner' in the situation. Yet it is this very role that puts Zoecon in the position of being well suited to carrying out the needed onsite cleanup. The petitioner has exclusive control over access to the property. As such, it must share in responsibility for the clean up.

Petitioner's final argument concerns the alleged inequity in imposing waste discharge requirements on the basis of site ownership when the actual discharger is known and can perform the clean up. Zoecon cites State Dept. of Environmental Protection v. Exxon, 376 A.2d 1339 (NJ Superior Court, Chancery Division 1977) . We do not speak here to that Court's application of New Jersey statutes since we question the comparability to the California statutory scheme. We do note however that the New Jersey court's conclusion regarding application of the common law nuisance doctrine would probably not be applied by a California court. This is because California Civil Code s 3483 provides that every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefore in the same manner as the one who first created it. [FN6]

We find that our decision today is in many ways analogous to our long standing policy of naming a landlord in waste discharge requirements if necessary and appropriate to the circumstances before the Regional Board. This is consistent with the recent trend in California cases that is contrary to the traditional rule of landlord's nonliability subject to certain exceptions. In Rowland v. Christian (1968) 69 C.2d 108, 70 Cal.Rptr. 97, 443 P.2d 651, California repudiated the traditional classification of duties governing the liability of an owner or possessor of land and substituted the basic approach of foreseeability of injury to others. See, e.g. 3 Witkin, Summary of California Law (8th Ed. 1980 Supp.) Section 453A, Uccello v. Lauderslayer (1975) 44 Cal.App.3d 504, 118 Cal.Rptr. 741.

The court in Uccello held that an enlightened public policy requires that a landlord owes a duty of care to correct a dangerous condition created by a tenant, where the landlord has actual knowledge of the condition and an opportunity and the ability to obviate it. 'To permit a landlord in such a situation to sit idly by in the face of the known danger to others must be deemed to be socially and legally unacceptable.' (44 Cal.App.3d at 513.)

For all of the above reasons, we conclude that the petitioner is a discharger of waste who was appropriately named in the Regional Board's waste discharge requirements.

3. Contention: Petitioner argues that it has been unconstitutionally denied due process and equal protection of the law in that it is the only property owner named as a discharger dispite the fact that adjacent properties are also contaminated.

Finding: Unrefuted testimony before the Regional Board indicates that the vast majority of the contaminated area is now

owned by Zoecon. A small portion of the contaminants have migrated off the site onto adjacent properties. Given the magnitude of the contamination found on the five-acre site which is the subject of the waste discharge requirements relative to the amount of contaminants on adjacent property, we find that it was appropriate for the Regional Board to exercise its discretion pursuant to Water Code s 13269 and not issue waste discharge requirements for adjacent property at this time. We note that such a waiver of requirements may be terminated at any time. If additional fact finding should reveal more extensive off-site contamination, the Regional Board should, of course, reconsider its decision to waive requirements for adjacent properties.

III. CONCLUSIONS

*6 After review of the record and consideration of the contentions of the petitioner, and for the reasons discussed above, we conclude:

Zoecon Corporation was properly named as a discharger in Order No. 85-67 (Waste Discharge Requirements for Rhone-Poulenc, Inc. and Zoecon Corporation, East Palo Alto, San Mateo County) by the California Regional Water Quality Control Board, San Francisco Bay Region.

IV. ORDER

IT IS HEREBY ORDERED THAT the petition is denied.

FN1 Evaluation of Corrective Measure Plans for the 1990 Bay Road Site, East Palo Alto, California by Woodward-Clyde Consultants, November 27, 1984, p. 24- 25.

FN2 Under this section, any person who intentionally or negligently causes or permits any oil to be deposited in waters of the state is liable for a maximum civil penalty of $6,000 and for all actual damages, in addition to the reasonable costs actually incurred in abating or cleaning up the oil deposit.

FN3 Section 36 of the bill that enacted the Porter-Cologne Act (Stats. 1969, Ch. 482) provided:
'This act is intended to implement the legislative recommendations of the final report of the State Water Resources Control Board submitted to the 1969 Regular Session of the Legislature entitled 'Rcommended Changes in Water Quality Control', prepared by the Study Project-Water Quality Control Program.'
The cited report contained the following comment, at page 24 of Appendix A to the report, about the definition of waste in Water Code Section 13050(d):
'It is intended that the proposed definition of waste will be interpreted to include all the materials, etc. which the Attorney General has interpreted to be included in the definitions of 'sewage', 'industrial waste', and 'other waste' [under the Dickey

Act].'
Even without this indication of legislative intent to adopt specific opinions of the Attorney General as part of legislation, under general rules of statutory construction, it is presumed that an interpretation of a statute in an opinion of the Attorney General has come to the attention of the Legislature, and if that interpretation were contrary to the intent of the Legislature, the Legislature would have adopted corrective language in amendments on the subject. (California Correctional Officers' Assn. v. Board of Administration (1978) 76 Cal.App.3d 786, 794.)

FN4 Reporter's Transcript, California Regional Water Quality Control Board, San Francisco Bay Region, Proceedings Regarding Rhone-Poulenc and Zoecon Corporation--Waste Discharge Requirements, May 15, 1985, Page 29; Zoecon Corp. v. Rhone-Poulenc, Inc., Cal. Superior Court, County of San Mateo, No. 260687.

FN5 Under the general rule of caveat emptor (let the buyer beware) in the absence of an express agreement, the vendor of land is not liable to his vendee for the condition of the land existing at the time of transfer.

FN6 Common law governs in California only to the extent that it has not been modified by statute. [Victory Oil Co. v. Hancock Oil Co. 125 Cal.App.2d 222, 229, 270 P2d 604 (1954)]
1986 WL 25502 (Cal.St.Wat.Res.Bd.)
END OF DOCUMENT

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State Water Resources Control Board
State of California

*1 IN THE MATTER OF THE PETITIONS OF
ARTHUR SPITZER, HARVEY JACK MULLER AND BETTINA BRENDEL
SPIC & SPAN, INC. AND S & S ENTERPRISES, INC.
ARATEX SERVICES, INC.
ORDER NO. WQ 89-8
May 16, 1989

For Review of Cleanup and Abatement Orders Nos. 88-10 and 88-69 of the California Regional Water Quality Control Board, Santa Ana Region. Our File Nos. A-537, A-537(a) and A-537(b).

BY THE BOARD:

On March 11, 1988, the Regional Water Quality Control Board, Santa Ana Region (Regional Board) adopted Cleanup and Abatement Order 88-10. The Order provides for the cleanup of soil and groundwater contaminated by perchloroethylene (PCE) at a site where dry cleaning businesses had operated for many years. PCE is commonly used as a dry cleaning solvent. The property is located at 14072 Magnolia Avenue in the City of Westminster (the Property). The dischargers named in the order include New Fashion Cleaners, Inc., which operated a dry cleaning business on the Property (New Fashion) and Spic & Span, Inc. and S & S Enterprises, Inc. (collectively referred to as Spic & Span). Spic & Span leased a building on the Property and its subsidiary, S & S Enterprises, Inc., operated a dry cleaning business there. Spic & Span and S & S have petitioned the State Board for review of Order No. 88-10. Also named as dischargers were Arthur Spitzer, Harvey Jack Muller and Bettina Brendel, who are the owners of the Property (referred to collectively, along with all their predecessors in interest, as the Owners). They have also petitioned the State Board for review of Order No. 88-10. Sol E. Tunks and Ed Tsuruta (formerly T & F, Inc.) are lessees of the Property under a ground lease and they subleased the property to the dry cleaners. They were also named as dischargers but are not petitioners.

After Order 88-10 was issued, the Regional Board learned that New Fashion had been acquired by Aratex, Services Inc. (Aratex). On July 8, 1988, the Regional Board adopted Cleanup and Abatement Order 88-69 to include Aratex. Aratex has petitioned the State Board for review of both Orders No. 88-10 and 88-69 (Cleanup and Abatement Orders 88-10 and 88-69 are referred to collectively as the Orders).

Because Order 88-69 was adopted after Spic & Span and Owners had filed petitions and because Orders No. 88-69 merely amends Order No. 88-10, their petitions will be reviewed as applicable to both Orders.

I. BACKGROUND

On July 6, 1987 a construction contractor discovered a manhole cover which was part of an old subsurface disposal system on the Property. The contractor was working for Shopwest Partners, Ltd. (the successor in interest of Los Angeles Land Company, collectively referred to as L.A. Land) which was developing the Property as a shopping center. Further investigations would disclose that the soils around the disposal system were contaminated with PCE and that there was a pollution plume extending approximately 250 feet from the disposal system. On March 11, 1988, the Regional Water Quality Control Board, Santa Ana Region issued Cleanup and Abatement Order 88-10, requiring numerous parties to provide for the cleanup of the PCE. The dispute under review here encompasses the responsibilities of the many individuals and business entities that have owned or occupied the Property, and their successors in interest.

*2 The history of ownership and possession of this Property is complex and that history is an important element of this case.

In 1959, the Owners leased the Property to Ed Tunks and Martha E. Tunks for a period of 75 years. [FN1] The Tunks' then assigned their ground lease to T & F, Inc. (T & F) [FN2]

In 1960, T & F built a market building on the Property, which was vacant land at the time. A few years later, T & F built another building which was used for a variety store until 1966. In 1966, T & F subleased the variety store to New Fashion which installed dry cleaning equipment in the building and began operation. At that time the building was not connected to a sewer but used a subsurface disposal system. A sewer connection was completed in 1969 but the subsurface disposal system remained in place.

In 1970, New Fashion moved out and Spic & Span moved in under a sublease with T & F. Spic & Span operated a dry cleaning business in the variety store building until May, 1987.

In 1986, the Owners and T & F completed negotiations with L.A. Land, a company which wanted to develop a shopping center on the Property. As a result of these discussions Owners and T & F negotiated a new ground lease of the Property so that T & F could sublease the entire Property to L.A. Land.

In December, 1986, T & F agreed to sublease the entire Property to L.A. Land until May 30, 2034. Under the sublease, T & F, assigned to L.A. Land all of its rights and responsibilities under the ground lease between Owners and T & F. T & F, Inc. also assigned to L.A. Land, its sublease with Spic & Span. Subject to the terms of the sublease and the ground lease, L.A. Land will have exclusive possession and control of the Property for the next forty-five years.

L.A. Land also negotiated a lease termination agreement with Spic & Span. Among other things, the termination agreement provided that Spic & Span

"shall remove all toxic or hazardous wase (sic) containers from the Premises, and they have no knowledge of other toxic or hazardous waste on the Premises."

The termination agreement also provided that the Spic & Span sublease would terminate May 22, 1987,

one day after the effective date of the sublease between L.A. Land and T & F.

On July 6, 1987, a contractor who was grading the Property for L.A. Land encountered a manhole cover which was part of the old subsurface disposal system. The manhole cover had been buried under one or two feet of soil and was part of what appeared to be a septic tank or seepage pit.

Liquid sludge was observed after the cover was removed. The Garden Grove Sanitary District instructed the contractor to pump out the sludge. The following day approximately 30 gallons of sludge were pumped out by a waste hauler.

The grading contractor then proceeded to further excavate the area and remove the underground structure which was part of the subsurface disposal system. In the process, the structure's cover was broken and the pieces were removed to another part of the Property. As excavation of the area immediately below the seepage pit progressed, severe PCE fumes began to emanate from the area. After complaints from neighbors, local fire department and health department officials ordered that the pit and the contaminated soils be temporarily covered with clean soils to eliminate the fumes until the soils could be fully excavated and hauled away.

*3 L.A. Land immediately retained contractors to excavate the site and remove contaminated soils. Approximately 338 cubic yards of soil was removed. Soils were removed to the level at which ground water was encountered.

In August, 1987, L.A. Land's consultant installed monitoring wells in order to perform a preliminary assessment of the extent of the groundwater pollution at the site. Samples showed PCE in the groundwater as high as 72,000 parts per billion. Data indicated that a pollution plume extended at least 250 feet from the excavation site. A diagram showing the locations of the wells is attached and incorporated in this order as Exhibit A.

The consultant also designed and installed an interim groundwater cleanup system. Some elements of the system, a recovery well and infiltration gallery, were installed in December, 1987. The treatment system was not installed and so the cleanup system is not operational.

The Regional Board issued Cleanup and Abatement Order No. 88-10 on March, 11 1988. It required New Fashion, Spic & Span, and T & F to delineate the pollution plume and to cleanup of the pollution by certain dates. The Order also provided that the Owners would be responsible for these activities only if the other named dischargers did not timely complete these tasks. The Regional Board decided not to include L.A. Land in the Order. A few months later the Regional Board learned that New Fashion had changed its name to Fashion-Tex and that all of its stock had been purchased by Aratex. They adopted Order 88-69 amending Order 88-10 to substitute Aratex for New Fashion.

Since the Orders were adopted, planning for cleanup has proceeded. However, to date the partially installed system has not been completed nor is any other cleanup system operated on the Property.

II. CONTENTIONS AND FINDINGS

1. Contention: The Owners contend that they should not be included in the order because they have no involvement or control over the use of the Property.

Finding: A long line of State Board orders have upheld Regional Board orders holding landowners responsible for cleanup of pollution on their property regardless of their involvement in the activities that initially caused the pollution. Most recently, this Board held that a landowner had ultimate responsibility for a cleanup even though he acquired the property after a previous owner had discharged pesticides to the land. (Schmidl, (1989) Order No. WQ 89-1)

A Regional Board may order any person to cleanup a discharge if that person has permitted or permits a discharge which causes water pollution (Water Code Section 13304). A discharge is
"the flowing or issuing out, of harmful material from the site of the particular operation into the water of the State. The operation which produced the harmful material need not, however be currently conducted." (27 Ops Atty Gen. 182, 183 (1956); Zoecon, (1986) Order No. WQ 86-2)

A landowner is ultimately responsible for the condition of his property, even if he is not involved in day-to-day operations. If he knows of a discharge on his property and has sufficient control of the property to correct it, he should be subject to a cleanup order under Water Code Section 13304 (Logsdon, (1984) Order No. 84-6; Vallco Park, Ltd., (1986) Order No. WQ 86-18; cf. Leslie Salt Company v. San Francisco Bay Conservation & Development Commission (1984) 153 Cal.App.3d 605, 200 Cal.Rptr. 575).

***4** The Owners in this case claim that they did not know anything about activities on the Property. Although, they knew that a dry cleaning business was located there, they did not know what the dry cleaners were doing with the PCE. However, they now know that there is PCE contamination in the soil and ground water at the Property. The discharge of the PCE did not cease when the dry cleaning businesses stopped. The discharge continues as long as the PCE remains in the soil and ground water. Therefore, the Owners do know about the discharge of pollutants on their property. (Zoecon, supra; Schmidl, supra.

The Owners also have sufficient control of the Property to permit them to conduct a cleanup in the event that T & F and the other parties named in the cleanup and abatement order fail to do so. [FN3] The original lease with T & F required the lessee to,
"perform all work necessary to maintain the premises in good order and condition and to comply with all laws, ordinances, orders, rules, regulations and requirements of federal, state and municipal governments, and appropriate departments, commissions, boards and officers thereof." (Petition of Owners, Points and Authorities, Page 2)
A new lease was negotiated in 1986 and the original lease was terminated. According to Owner's petition:
"The new lease also requires the tenant, at no cost or expense to the landlord, to keep and maintain the premises in good order and condition, and the tenant has agreed to comply with all laws, ordinances, rules orders and regulations from time to time applicable, including those relating to health, safety, noise, environmental protection, waste disposal, and air and water quality." (Ibid.)

The Owners have the right to regain possession of the Property if the lessee does not perform its obligations.

These lease terms are very similar to the lease terms analyzed in two previous State Board orders, Logsdon, supra and Vallco Park, Ltd, supra, which addressed the issue of landlord control over leased property. In Vallco Park, Ltd. and in the case at hand, the landlord was not required to cleanup the pollution unless the lessee or other responsible parties failed to do so. In both Logsdon and Vallco Park, Ltd., it was determined that the landlord had control of the property sufficient to permit the landlord to comply with the Regional Board order. (See also Southern California Edison Co. (1986) Order No. WQ 86- 11; U.S. Forest Service (1987) Order No. WQ 87-5; Prudential Insurance Company of America, (1987) Order No. WQ 87-6). We reach the same conclusion here.

2. Contention: All of the petitioners contend that L.A. Land should have been included in the Orders as a discharger. This contention is based on three separate theories which are discussed below under the sub-headings of Contentions A, B and C.

Contention A: Spic & Span and Aratex contend that when L.A. Land excavated the subsurface disposal system it shattered a septic tank spilling PCE on the Property.

*5 Findings: The evidence does not support this contention.

The evidence indicates that the subsurface disposal structure was a seepage pit or cess pool and not a septic tank. The only eyewitness report, that of L.A. Land's contractor, describes it as a seepage pit or cess pool with a concrete cover. No government representative who observed the pieces of the concrete structure after it was removed describes it as a tank. The only contradictory evidence is a declaration of Spic & Span's manager who did not see the structure but who states that L.A. Land's representative described it as a tank. This declaration does not outweigh the other evidence to the contrary.

Regardless of the nature of the structure, other evidence on the record indicates that L.A. Land's excavation did not cause the PCE pollution on the Property.

Liquid sludge was observed in the seepage pit area and the Garden Grove Sanitary District instructed L.A. Land to pump the sludge out. Although, Spic & Span claims that only half of the sludge was pumped, they have no evidence to prove this claim. There is no reason why L.A. Land would report its findings to the Sanitary District and then not follow the District's instructions. Because the liquid sludge was pumped before the structure was removed, the likelihood of a spill was minimized.

Moreover, the evidence demonstrates that PCE had been present in the soils for many years. Monitoring wells at the site indicate a pollution plume of approximately 250 feet emanating from the area of the seepage pit. L.A. Land's consultants indicate an average flow rate of 2.1 feet/year. Based on lithology from boreholes, which indicate a heterogeneous section consisting of interfingering lenses of sand, silt, and clay, and the consultant's estimate of the ground water gradient, this is a reasonable figure. Assuming a worst case situation, with a steeper gradient and a hydraulic conductivity characteristic of a sand medium, the flow rate could be as high as 480 feet/year (although a flow rate this high is unlikely due to the heterogeneity and poorly sorted nature of the soils). Given this range of flow rates, a 250 foot

plume could not have occurred unless the PCE was been present before the excavation started. Additionally, PCE had been detected in a nearby drinking water well in 1986, indicating that the soils and water were polluted before excavation began.

The excavation may have caused a minor increase in discharge by disturbing the soils. However, any disturbance was offset by the removal of approximately 338 cubic yards of contaminated soils.

Contention B: Spic & Span and Aratex contend that L.A. Land contaminated a previously protected deep-water aquifer by negligently drilling through a protective clay layer protecting the aquifer, providing a vertical conduit through which PCE contaminated water may have descended.

Findings: There is no evidence on the record that the deeper aquifer was polluted after the drilling was done. In fact, samples taken from a deep aquifer drinking water well collected after L.A. Land came on the scene did not contain PCE, even though samples taken in 1986 did contain PCE.

***6** There is not substantial evidence demonstrating that the drilling pierced the protective clay layer. L.A. Land's consultant stated that the well was drilled to 55 feet. Regional characteristics indicate that the protective clay layer begins at 40 to 50 feet but may begin as deep as 60 feet. The clay layer is approximately 10 feet thick. Gamma logs provided by L.A. Land's consultant show that the clay layer was not pierced. Although gamma logs are not reliable without additional evidence, there is no evidence to the contrary.

The Orders require dischargers to define the vertical extent of the PCE contamination, including possible contamination of the deeper aquifer. If evidence is produced which shows deeper aquifer contamination or that the well drilling did pierce the protective clay layer, this issue should be reconsidered by the Regional Board.

Contention C: All petitioners assert that L.A. Land should be included as a discharger under the Orders because L.A. Land has exclusive possession and control of the Property and the Cleanup system which it installed.

Findings: It is undisputed that L.A. Land had no connection with the Property at the time that the dry cleaning businesses were operated. It is also clear, based on previous orders of this board, that if L.A. Land had purchased fee title to the Property it would have been named as a discharger in the Orders. (Zoecon, supra; Schmidl, supra). However, even though L.A. Land is not the fee owner, it did acquire exclusive possession and control of the Property for a term exceeding forty-five years. Additionally, L.A. Land took possession of the land knowing that hazardous chemicals had been used there and was aware of the possibility of pollution. [FN4]

The question is whether L.A. Land is a person who is permitting the discharge of pollutants, within the meaning of Water Code Section 13304, even though it does not have fee title to the Property. The answer is yes. During the forty- five year term of its lease, L.A. Land has the same ability to control the continuing discharge on the Property as it would have if it had fee title. Therefore, it is permitting the discharge of pollutants and should be named as a discharger under the Orders.

Previous orders of this Board, Attorney General's opinions and common law principles regarding duties to abate hazardous conditions on real property support this conclusion. They indicate that responsibility rests with one who has possession and control of the property and that it is not limited to those who hold fee ownership.

As noted above, the Attorney General has concluded that discharge continues as long as pollutants are being emitted at the site. He has further concluded that the "dischargers are the persons who now have legal control of the property from which such drainage arises." (26 Ops.Atty.Gen. 88, 90 (1955); 27 Ops.Atty.Gen. 182 (1956)). The Attorney General has also noted that in the case of a discharge from a mine if the fee ownership of the mine is separate from the mineral rights ownership, both the holder of the mineral rights as well as the fee owner are "dischargers." (Ibid.)

*7 We applied similar reasoning in Stuart Petroleum, (1986) Order No. 86- 15, when we held a lessee was liable for cleanup of pollution caused by its sublessee. We held that to "permit" a discharge included failing to take action when "the ability to obviate the condition" existed. In that case it was found that lessee knew about the sublessee's activities at the time the initial release occurred. Nonetheless, the same reasoning applies here when the one who controls the property knows of an ongoing discharge and has the ability to obviate it.

This interpretation is supported by common law principles regarding responsibility for hazardous conditions on property. In ruling on this issue in the past, this Board has relied on the principles stated in Rowland v. Christian (1968) 69 C.2d 108, 70 Cal.Rptr. 97, 443 P.2d 651. In Rowland, the California Supreme Court held that a possessor or occupier of land is liable for injuries when he fails to exercise reasonable care in the management of his property. The defendant in that case was a tenant of the property and not the fee owner. She was held liable for injuries caused by a broken faucet. There was no finding that she had caused the defect in the faucet. The court emphasized the tenant's failure to correct problem after she discovered it, not her culpability in causing it. The Court's holding was based on what it characterized as "the basic policy of the state" in Civil Code Section 1714 which provides in pertinent part,

"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person...."

Commentators have also enunciated the principle that the possession not ownership is a key factor in liability.

"The liability is imposed on an owner or possessor. 'The important thing in the law of torts is the possession, and not whether it is or is not rightful as between the possessor and some third person.' (6 Witkin Summary of California Law, (9th edition 1988) Section 892, p. 261 quoting Restatement of Torts 2d, Section 328E, Comment a)

Following the reasoning in Rowland, a person who possesses property is responsible for the maintenance of hazardous conditions on the property such as water pollution. Legal ownership is not a significant factor. Therefore, one who possesses and controls property should be considered a person who is permitting the continued discharge of water pollution on the property and is subject to a Cleanup and Abatement Order under Water Code Section 13304 during the term of that possession and control.

Although, L.A. Land should be named as a discharger in the Orders, it should have the same status as the Owners. It should be required to take responsibility for the cleanup only if the other dischargers fail to perform. This would be the equitable conclusion because, L.A. Land had no connection with the activities which initially caused the pollution, the parties directly responsible for the PCE release have been identified and are making some progress toward cleanup, and while L.A. Land has possession and control of the Property for a very long time, it shares that control with the Owners, who have the reversionary rights to the Property.

*8 3. Contention: Aratex, which purchased all the stock of New Fashion in 1984, contends that it should not be named as a discharger in the Orders because it is not legally responsible for the actions of New Fashion which occurred between 1966 and 1969.

Findings: New Fashion operated a dry cleaning business on the Property from 1966 through 1969 during the time that the drainage system was connected to a subsurface disposal system. Studies indicate that PCE pollution has existed on the Property for many years. It is reasonable to conclude that New Fashion disposed of at least some of the PCE found on the Property.

In 1982, New Fashion changed its name to Fashion-Tex Services, Inc. (Fashion- Tex). In 1984 the two shareholders of Fashion-Tex, Grant Wada and Shoji Yoshihara (collectively Wada and Yoshihara) sold all of their stock to Aratex. The purchase agreement required the officers of Fashion-Tex to resign and according to the records of the Secretary of State, the president of Aratex became the president of Fashion-Tex.

The question here is whether Aratex is legally responsible for the actions of Fashion-Tex which occurred fourteen years before Aratex purchased its stock.

Generally a parent corporation is not liable for the actions of its subsidiary. Like any other stockholder it is protected from liability by the corporate veil (McLaughlin v. L. Bloom Sons Co. (1962) 206 Cal.App.2d 848, 24 Cal.Rptr. 311). However, that corporate veil may be pierced if it is determined that the parent is really the alter ego of the subsidiary (6 Witkin Summary of California Law (8th Edition 1974) Corporations Section 11, p. 4323).

The conditions under which a corporate entity may be disregarded are founded in equity and vary depending on the special circumstances of the case (Goldsmith v. Tub-O-Wash (1959) 199 Cal.App.2d 132, 18 Cal.Rptr. 446, 451). Generally, the corporate entity will be disregarded when it is "so organized and controlled and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation." (McLaughlin v. L. Bloom Sons Co., supra 24 Cal.Rptr. at 313)

Aratex asserts that an inequity would result if it were held liable for actions taken by Fashion-Tex fourteen years before Aratex purchased it. However, it should be emphasized that the equities to be considered here do not concern Aratex's involvement in the release of the pollution on the Property. It is undisputed that they had no direct involvement there. The equities to be considered here, concern Aratex's status as the owner of Fashion-Tex and whether Aratex's control of Fashion-Tex was in accordance with accepted principles of corporate law. (See generally 2 Marsh's California Corporation Law (1988) Section 15-16).

Directing our analysis to corporate law, we conclude that it would be inequitable if Aratex were not held liable. The California Supreme Court has stated the principle that if one corporation acquires all the assets of another corporation without paying substantial consideration for the assets, the purchasing corporation is liable for the pre-purchase activities of the selling corporation. (Ray v. Alad, (1977) 19 Cal.3d 22, 136 Cal.Rptr. 574; Malone v. Red Top Cab, (1936) 16 Cal.App.2d 268, 60 P.2d 543; see Schoenberg v. Benner, (1967) 251 Cal.App.2d 154, 59 Cal.Rptr. 359). That principle applies here. Aratex acquired control of the assets of Fashion-Tex while ostensibly buying only the stock of Fashion-Tex. It then permitted Fashion-Tex to go out of business, leaving no corporate assets or ongoing business to pursue for the obligations of Fashion-Tex.

*9 Aratex purchased Fashion-Tex from Wada and Yoshihara. Wada and Yoshihara received the proceeds of the sale and set up a new, wholly unrelated corporation, coincidentally called New Fashion Cleaners. The corporation, Fashion-Tex, received no payment in that transaction. Only the former stockholders were paid.

The effect of the stock purchase was that Aratex acquired the assets of Fashion-Tex without paying cash to Fashion-Tex. Aratex's attorney testified at the Regional Board hearing that Fashion-Tex's assets "were not sold to the parent corporation; they were held by Aratex" (Regional Board hearing transcript, July 8 1988 at 22:13-14). Another Aratex attorney in correspondence to the State Board, repeatedly refers to the 1984 stock purchase as a purchase of Fashion-Tex assets (letter dated February 12, 1989, from Bonnie Ezkanazi, Aratex's attorney, to Jennifer Soloway, Staff Counsel, State Board). It is also reasonable to conclude that Aratex is using Fashion-Tex's assets because Fashion-Tex is not using them. Aratex's attorney has testified that Fashion-Tex does not carry on any business (Regional Board Transcript, July 8 1988, 18:8-13).

If Aratex had, in good faith, purchased the assets from Fashion-Tex, cash payment should have been made to the corporation not the shareholders. Here, Aratex may have paid substantial consideration to Wada and Yoshihara for their stock, but they paid nothing to Fashion-Tex for its assets. In accordance with the principle articulated in Ray v. Alad, supra, it would be inequitable to afford Aratex the protection of the corporate veil of Fashion-Tex.

Aratex asserts that if it is named in the Orders it should be only "secondarily" liable. That would not be appropriate. Fashion-Tex, under its former name, New Fashion, released PCE to the soils at the Property, polluting the waters of the State. There is no doubt that Fashion-Tex should be responsible for the cleanup to the same degree as Spic & Span and T & F. For the reasons stated above, Aratex has stepped into Fashion-Tex's shoes and is responsible for Fashion-Tex's liabilities. Therefore, there is no justification for imposing different liability against Aratex than would be imposed against than Fashion-Tex.

III. CONCLUSIONS

1. Arthur Spitzer, Harvey Jack Muller and Bettina Brendel are fee owners of the Property and are

persons who are permitting the discharge of pollutants on the Property and the Regional Board acted appropriately when it included them as dischargers in the Orders.

2. The evidence on the record demonstrates that L.A. Land did not cause a spill of PCE at the site when it excavated the subsurface disposal system.

3. There is not sufficient evidence on the record to support Spic & Span's contention that L.A. Land contaminated the deeper aquifer when drilling a monitoring well.

4. L.A. Land, which has exclusive possession and control of the Property until 2034, is a person who is permitting the discharge of pollution within the meaning of Water Code Section 13304 and the Regional Board acted improperly when it failed to include L.A. Land as a discharger in the Orders. L.A. Land should be responsible for the tasks required by the Orders, only if Spic & Span, Aratex and T & F fail to timely carry out the requirements of the Orders.

***10** 5. As a matter of law, Aratex is liable for the acts of Fashion-Tex Services, Inc. and the Regional Board acted appropriately when it included Aratex Services, Inc. in the Orders. Because Aratex is responsible for the actions of Fashion-Tex, Aratex should be responsible for the tasks required by the Orders on the same basis as Spic & Span and T & F.

IV. ORDER

1. The portion of the petition of Arthur Spitzer, Harvey Jack Muller and Bettina Brendel which requests that the Orders be amended to remove their names, is dismissed.

2. The portion of the petition of Aratex Services, Inc. which requests that the Orders be amended to remove its name, is dismissed.

3. The petition of Spic & Span, Inc. and S & S Enterprises, Inc., and the portion of the petition of Arthur Spitzer, Harvey Jack Muller and Bettina Brendel, and the portion of the petition of Aratex Services, Inc. which request that Los Angeles Land Company, Inc. and Shopwest Partners, Ltd. be included as dischargers in the Orders are granted and order No. 88-10 of the Regional Water Quality Control Board, Santa Ana Region is amended as follows:

(1) Amend the title by adding Los Angeles Land Company, Inc. and Shopwest Partners, Ltd. to the list of dischargers.

(2) Amend the introductory clause of item B. of the order to read:

"Spitzer, Los Angeles Land Company, Inc. and Shopwest Partners, Ltd. shall:"

The rest of item B. shall remain the same except as it may be amended by subsequent Regional Board order.

(3) Amend the introductory clause of item C. of the order to read:
"Spitzer, Los Angeles Land Company, Inc., Shopwest Partners, Ltd., Sol E. Tunks and Ed Tsuruta, Aratex Services, Inc., Spic and Span, Inc., and S & S Enterprises, Inc., shall:"

The rest of item C. shall remain the same except as it may be amended by subsequent Regional Board order.

FN1 The owners in 1959, were Arthur Spitzer and his wife, Bettina Brendel. During the term of the ground lease, Arthur Spitzer's ownership interest in the Property was assigned to the Ann Violet Spitzer Lucas Trust. The trustees of the Trust are Arthur Spitzer and Jack Harvey Muller. Mr. Spitzer and Mr. Muller are named in the Cleanup and Abatement Order as trustees of the Trust. Bettina Brendel's ownership was continuous through the date of the Cleanup and Abatement Order. They are referred to in this order collectively as the Owners.

FN2 T & F, Inc. dissolved in 1987 and assigned the ground lease to Sol E. Tunks and Ed Tsuruta, who are named as dischargers in the Cleanup and Abatement Order.

FN3 Cleanup and Abatement Orders 88-10 and 88-69 do not require Owners to undertake cleanup unless the other named parties fail to comply with the time schedule in the orders.

FN4 This is evidenced by the termination agreement with Spic & Span which required Spic & Span to remove all hazardous waste from the site.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

1989 WL 97148 (Cal.St.Wat.Res.Bd.)

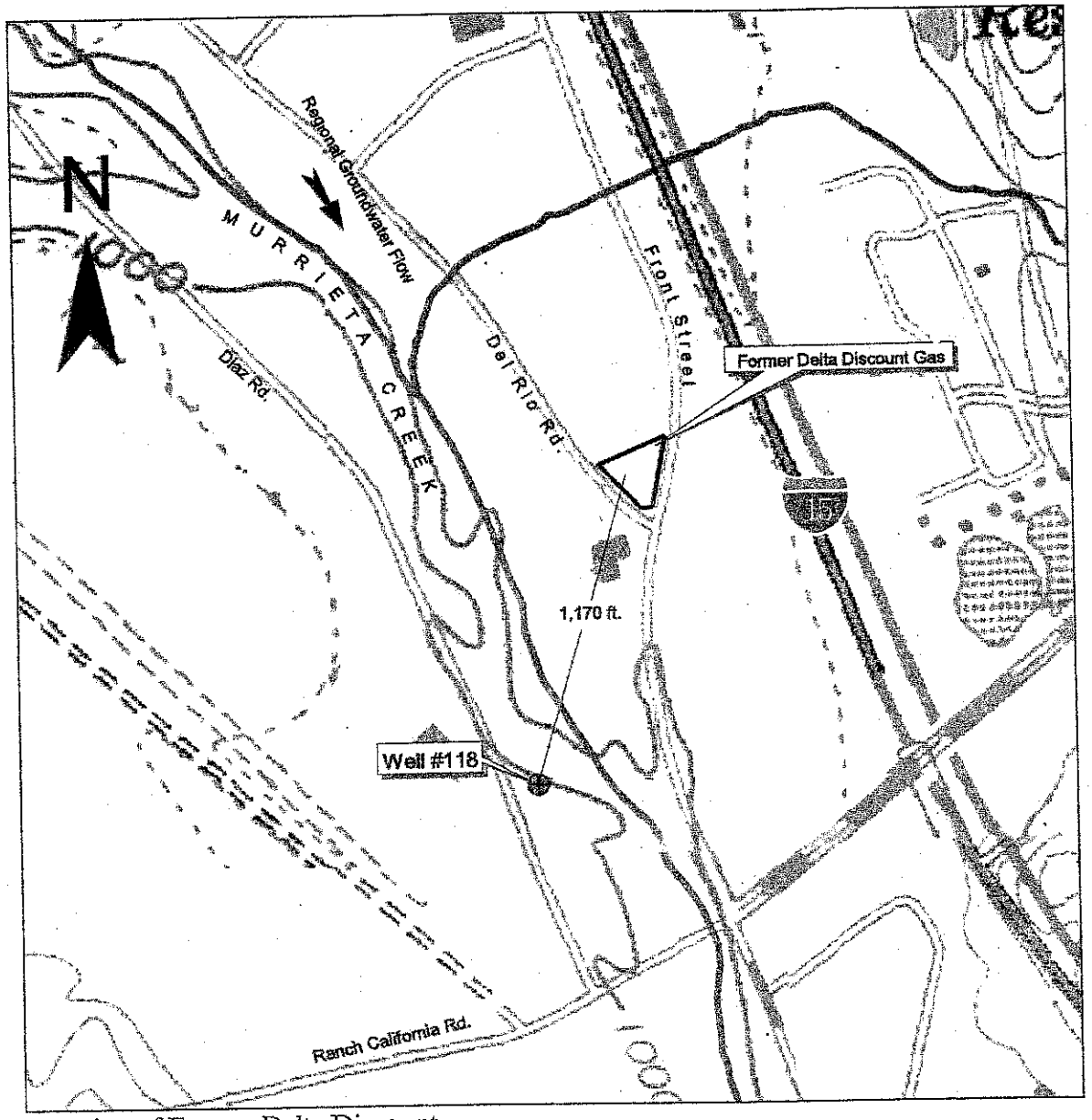
END OF DOCUMENT

ITEM 17
Sup. Doc. 6

RE :EXPENDITURE INCURRED FOR WORK DONE AT 28111. FRONT STREET.TEMECULA BY NARAIN OIL INC FROM JAN. 2001 TO OCT.2002

	CONTRACT	PAID	DUE
TOTALS	**$ 140,076.48**	**$ 85,227.74**	**$ 54,848.74**
SITE ASSESMENT	CONTRACT	PAID	DUE
WORKPLAN FOR SITE ASSESMENT	$ 4,700.00	$ 4,700.00	$ -
SITE ASSESMENT/ WORKPLAN/TAIC	$ 18,630.00	$ 18,630.00	$ -
SITE ASSESMENT/ WORKPLAN/SUB CONTRACTORS	$ 16,705.00	$ 16,705.00	$ -
SITE ASSESMENT/ WORKPLAN/OUTSIDE EXPENSES	$ 1,072.00	$ 1,072.00	$ -
GROUNDWATER MONITORING			
IST QUARTER 2001	$ 2,072.00	$ 2,072.00	$ -
4TH QTR 2001	$ 3,000.00	$ 3,000.00	$ -
IST QTR 2002	$ 3,300.00	$ 3,300.00	$ -
SOIL/GROUNDWATER INVESTIGATION			
WORKPLAN	$ 1,200.00	$ 1,200.00	$ -
INTERIM REMEDIAL ACTION	$ 3,200.00	$ 3,200.00	$ -
SITE CONCEPTUAL MODEL	$ 16,500.00	$ 5,500.00	$ 11,000.00
E.P.REMEDIATION	$ 42,000.00	$ 12,000.00	$ 30,000.00
SITE CONCEPTUAL MODEL (TAIT ENVIRONMENTAL)	$ 13,197.48	$ 6,598.74	$ 6,598.74
118 WELL INVESTIGATION			
MONITORING WELLS AT SITE	$ 14,500.00	$ 7,250.00	$ 7,250.00

ITEM 17
Sup Doc 7



Location of Former Delta Discount
Source: U.S. Geologic Survey 24k Quad Map (modified by SDRWQCB)